In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 819

WILLIAM C. LINN, PETITIONER

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's invitation of March 8, 1965.

The question presented is whether the National Labor Relations Act bars the maintenance of a libel action instituted under State law by an official of an employer subject to the Act, seeking damages for defamatory statements made during a union organizing campaign by the union and its officers with alleged knowledge that the statements were false. The court of appeals held that under *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245, the subject matter of the complaint was "arguably subject" to, and therefore preempted by, the

National Labor Relations Act, and that the district court properly dismissed the complaint.

We submit that this is an important question which this Court should decide, and we therefore urge that the petition be granted. We shall merely summarize some of the pertinent arguments and policy considerations involved, but without attempting to suggest the answers. If certiorari is granted, we shall file a comprehensive brief.

1. The rationale of the preemption doctrine formulated in *Garmon*—that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board" (359 U.S. at 245)—is that such deferral is necessary "if the danger of state interference with national policy is to be averted" (*ibid*). "To leave the States free to regulate" "activities which * * * are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8 * * * involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. * * * [T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes" (p. 244).

The Court further recognized, however, that the National Labor Relations Act had not withdrawn regulatory power from the States "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence

of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act" (p. 244). The Court cited for the latter proposition its decisions which upheld the authority of the States to grant relief for tortious conduct that was "marked by violence and imminent threats to the public order" (p. 247).

The present case requires a reconciliation and accommodation of these conflicting policies. Defamatory statements made during a labor dispute ordinarily would not, of themselves, constitute an unfair labor practice under § 8 of the Act, and the Board normally would neither have occasion to determine that question nor ability to provide any effective remedy therefor. On the other hand, certain opprobrious words which State law might consider defamatory may be so commonly employed in labor disputes as to make it appropriate to treat their utterance as a protected activity under § 7, which guarantees to employees "the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The theory would have to be that employees and their representatives would be deterred from speaking freely, and hence from exercising to the fullest their right to engage in concerted activities, if they were subject to possible liability should their words be held defamatory under the varying standards of State law. Cf. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 277–279; *Barr* v. *Matteo,* 360 U.S. 564, 571–572.

On the other hand, it can be argued that such an expansive interpretation of Section 7 would go considerably beyond any demonstrated need for federal protection or other specific evidence of congressional intent. While the phrase "concerted activities" in Section 7 was designed to protect employees against the harmful effects of the doctrine that concerted activities were conspiracies and for that reason unlawful (*Auto Workers* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, 257–258), one may well question whether there was ever any intent to relieve employees from normal duties not to violate the rights of others which are uniformly applied to all persons under the law of torts, whether or not they are engaged in organizational activities or a labor dispute. Certainly there is nothing affirmative in the language, legislative history or policy of the Act that indicates any clear congressional intention to confer upon employers or employees a broader federal privilege than the normal State law of defamation accords.

2. If Section 7 protects statements which would be defamatory under State law, then the federal right must prevail as a matter of substantive law. It does not necessarily follow, however, that the State courts are ousted of jurisdiction. As we have noted, defamation is a subject of traditional State concern that touches closely upon local interests. If the States are denied jurisdiction in situations where the language is arguably protected by Section 7, unprivileged injuries to reputation will be left without relief. The Board cannot award damages for defa-

mation. A cease and desist order, even when enforced by injunction, gives the victim no redress for the injury already suffered. The familiar precept that a State tribunal has no jurisdiction where the conduct with which the defendant is charged is arguably protected or arguably prohibited by the National Labor Relations Act, is subject to exceptions in cases involving violence,[1] interference with membership rights,[2] and breach of contract.[3] Furthermore, the precept rests primarily upon the need to avoid disturbing the delicate balance struck by Congress as a matter of national labor policy in determining what conduct should be regulated and what should be free. Compare *Teamsters Union* v. *Morton,* 377 U.S. 252, 259–261. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits" (*Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776,* 346 U.S. 485, 499–500). When one is dealing with laws designed to regulate labor-management relations as such, the zone delimited by what is arguably protected or prohibited marks the area in which the failure of Congress to act fairly gives

[1] *United Automobile Workers* v. *Russell*, 356 U.S. 634; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131; *United Automobile Workers* v. *Wisconsin Board*, 351 U.S. 266; *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656.

[2] *Machinists* v. *Gonzales*, 356 U.S. 617.

[3] *Smith* v. *Evening News Association*, 371 U.S. 195; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261.

rise to the inference that Congress determined to leave the parties to their own devices, unprotected and uninhibited. Such an inference might well be thought to carry little force, however, with respect to rules of tort liability which normally apply to all members of the community alike and involve no special appraisal of the conflicting interests of management, labor and the public in union organization and labor disputes. Cf. Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1321 *et. seq.*

3. The issue raised by the petition for certiorari in the present case appears to be arising with increasing frequency[4] and is, in our judgment, sufficiently vexing to warrant a decision by this Court.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
STEPHEN B. GOLDBERG,
LAURENCE S. GOLD,
Attorneys,
National Labor Relations Board.

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[4] See, *e.g.*, *Blum* v. *International Association of Machinists*, 42 N.J. 389, 201 A. 2d 46; *Hill* v. *Moe*, 367 P. 2d 739 (Sup. Ct. Alaska), certiorari denied, 370 U.S. 916; *Meyer* v. *Joint Council 53, Teamsters*, 58 LRRM 2183, (Sup. Ct. Pa.); *Oss* v. *Birmingham*, 58 LRRM 2754 (Sup. Ct. Arizona).

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